Supreme Court, U.S.
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No. 95-1341

In the Supreme Court of the United States

OCTOBER TERM, 1995

THEODORE ROBINSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the use of a Forward Looking Infrared Device (FLIR) to detect the intensity of heat emanating from petitioner's residence constituted an unreasonable search in violation of the Fourth Amendment.

2. Whether the agent's affidavit in support of a search warrant for petitioner's residence established probable cause for the search.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-43) is reported at 62 F.3d 1325. The orders of the district court (Pet. App. 1-8) denying petitioner's motion to suppress are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1995. A petition for rehearing was denied on November 20, 1995. Pet. App. 44-45. The petition for a writ of certiorari was filed on February 20, 1996 (a Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Middle District of Alabama, petitioner was convicted of manufacturing and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 130 months' imprisonment, to be followed by four years of supervised release. The court of appeals affirmed. Pet. App. 20-43.

1. In December 1991, Agent Charles West of the Alabama Department of Public Safety learned that 30 high-pressure sodium lights had been shipped from California to petitioner's address in Tuskegee, Alabama. Agent West knew that such lights are often used by individuals to grow marijuana indoors. He also knew that such lights, which are commonly used to illuminate intersections on interstate highways, consume a large amount of electricity and generate a large amount of heat. Agent West subsequently learned that petitioner had ordered similar lights as well as hydroponic equipment, which is also often used to grow marijuana indoors, in 1989 and 1990. Pet. App. 26-27; Gov't C.A. Br. 2-3.

Agent West subpoenaed petitioner's utility records. The records showed that petitioner's average kilowatt consumption of 5,570 hours with an average utility statement of approximately $411 for June, July, and August of 1991 increased to nearly 10,000 kilowatt hours with a utility statement of $562 for December 1991. During his investigation, Agent West observed that petitioner owned an attractive

house with a swimming pool and a nearby lot containing a new prefabricated building, and he estimated that the house contained 2,800 square feet. Individuals who owned houses of comparable size told the agent that their monthly utility statements were between $130 and $150. Agent West learned that the 30 high-pressure sodium lights cost slightly more than $7,000 and that petitioner had paid for the lights with a cashier's check. He also determined that petitioner had not filed state income tax returns with the Alabama Department of Revenue. Pet. App. 27; Gov't C.A. Br. 3-4.

At Agent West's direction, a helicopter crew conducted aerial surveillance of petitioner's house with a Forward Looking Infrared Receiver (FLIR). The FLIR is a thermal imaging device that detects differences between the amounts of heat emitted from various sources. The differences in surface temperature are displayed on videotape as shapes ranging from black or dark grey when an object emits little heat to white when an object emits intense heat. The FLIR showed that petitioner's house was considerably warmer than the surrounding houses. Pet. App. 27-28, 39 n.2; Gov't C.A. Br. 4.

On January 30, 1992, Agent West applied for and obtained a search warrant for petitioner's house. When the warrant was executed the following day, Agent West and other agents found a large indoor marijuana growing operation in the house. They also found a shotgun, a rifle, and two revolvers near the marijuana growing operation. Pet. App. 28; Gov't C.A. Br. 4.

2. The district court denied petitioner's motion to suppress the evidence seized pursuant to the search warrant. Pet. App. 1-8. It held that the aerial FLIR

surveillance of petitioner's house did not constitute an unlawful search under the Fourth Amendment. *Id.* at 2-3. The court also concluded that Agent West's affidavit in support of the search warrant established probable cause to justify issuance of the warrant. *Id.* at 4-6.

3. The court of appeals affirmed. Pet. App. 20-43. It held that the use of the FLIR device to detect the heat emitted from petitioner's house did not constitute an unreasonable search under the Fourth Amendment. *Id.* at 29-34. The court noted that "a party alleging an unconstitutional search under the Fourth Amendment must establish *both* a subjective and objective expectation of privacy to succeed." *Id.* at 29-30. The court concluded that petitioner had not satisfied either component of that two-part test. Because "the record d[id] not indicate that [petitioner] affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house," the court held that petitioner "ha[d] not established a subjective expectation of privacy in this heat emitted from his home." *Id.* at 31. In addition, the court concluded that petitioner had "failed to establish an objective or reasonable expectation of privacy in the heat emitted from his house resulting from the unlawful marijuana cultivation inside, even if he had met the subjective component" of the applicable constitutional test. *Id.* at 34. The court was "unconvinced that society would ever accept use of the Fourth Amendment to shield unlawful activity within one's home when there are noninvasive methods of detecting such criminal activity through legitimate byproducts, such as the heat at issue in this case." *Ibid.*

The court of appeals also held that Agent West's affidavit in support of the search warrant established probable cause to justify issuance of the warrant. Pet. App. 34-37. The court explained that "[t]he thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in [petitioner's] house." *Id.* at 37. "Notwithstanding the additional evidence obtained from the aerial FLIR surveillance," the court "note[d] that the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question." *Id.* at 36.

Judge Edmondson concurred. Pet. App. 38. He admitted to "considerable doubt" on the question "whether [petitioner] had a subjective expectation of privacy in the heat generated by his indoor marijuana cultivation." *Ibid.* Because he "believe[d] the subjective intent issue could be decided either way without affecting the outcome of *this* case," Judge Edmondson "decline[d] to decide the unnecessary and * * * delicate question of subjective intent." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the use of the FLIR device during the aerial surveillance of his residence constituted an unreasonable search under the Fourth Amendment. The court of appeals' decision rejecting that claim is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the agent's affidavit in support of the search warrant in this case established probable cause to justify the issuance of the search warrant even in the absence of the results of the FLIR surveillance.

This Court employs a two-part test to determine whether an individual has a constitutionally protected expectation of privacy in an object or location: "[F]irst, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); see also *Oliver* v. *United States*, 466 U.S. 170, 177 (1984); *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Ciraolo*, the Court held that a police overflight of a private residence did not require a warrant. The Court concluded that an individual has no reasonable expectation of privacy in an area (the backyard of his home) that is visible to the naked eye from an aircraft in navigable airspace. 476 U.S. at 212-214; see also *Florida* v. *Riley*, 488 U.S. 445, 449-452 (1989) (plurality opinion). In *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 234-239 (1986), the Court similarly held that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace did not require a warrant.

In this case, petitioner did not satisfy either component of the applicable two-part test. First, petitioner did "not establish[] a subjective expectation of privacy in th[e] heat emitted from his home." Pet. App. 31. As the court of appeals explained, "[w]hile [petitioner] attempted to conceal his marijuana growing operation by conducting it inside his home, the record does not indicate that he affirmatively took any action to prevent the resulting heat from being emitted into the atmosphere above his house." *Id.* at 30-31. Because "[petitioner's] *inaction* regarding the heat generated from his marijuana cultivation demonstrate[d] his lack of concern for it[,]" he had not

manifested a subjective expectation of privacy in the object of the challenged search. *Id.* at 31.

Second, even if petitioner had a subjective expectation of privacy in the level of heat emitted from his residence, it was not a legitimate expectation worthy of societal protection. In *Ciraolo*, this Court emphasized that "'[t]he test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" 476 U.S. at 212 (quoting *Oliver* v. *United States*, 466 U.S. at 181-183). Here, as the court of appeals correctly explained, "[n]o revelation of intimate, even definitive, detail within the house was detectable [by the FLIR surveillance]; there was merely a gross, nondiscrete bright image indicating the heat emitted from the residence." Pet. App. 32. Moreover, "there was no intrusion whatsoever into [petitioner's] home because the emitted heat rose from his house and then was measured by FLIR surveillance." *Id.* at 33. Hence, "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by [FLIR] thermal imagery." *Id.* at 33-34 (quoting *United States* v. *Pinson*, 24 F.3d 1056, 1059 (8th Cir.), cert. denied, 115 S. Ct. 664 (1994)).

In *Dow Chemical*, this Court acknowledged that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. at 238. The Court went on to explain, however, that

> the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.

Id. at 238-239 (footnote omitted). The Court thus focused on the potential of a particular surveillance technique to reveal information that is genuinely private.

In this case, "the FLIR surveillance revealed only that [petitioner's] house emitted significantly more heat than others in the neighborhood of similar size." Pet. App. 32. As the court of appeals explained, "[s]uch heat detection with thermal imagery is not the 'functional equivalent of an X-ray machine in that it allows officers to "see" within a structure what it otherwise cannot see with the naked eye.'" *Id.* at 32-33 (quoting *United States* v. *Ishmael*, 48 F.3d 850, 856 (5th Cir.), cert. denied, 116 S. Ct. 74, 75 (1995)). Rather, the thermal imaging technique is more nearly comparable to conventional photography. While conventional photography records the image of an object based on the object's emission of radiation from the visible portion of the electromagnetic spectrum, thermal imaging simply records images based on the object's emissions from the infrared portion of the

electromagnetic spectrum. Quite unlike x-ray photography, thermal imaging merely produces a picture of the surface temperature of the exterior of an object based on the radiation that object emits. Because the FLIR device does not penetrate the walls or otherwise reveal what is occurring within a residence, its use does not "infringe[] upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212 (quotation omitted).[1]

Although petitioner asserts (Pet. 13) that it is "self-evident" that the use of FLIR device is "sufficiently intrusive" to constitute a search, the court of appeals' decision in this case is consistent with the decisions of the other courts of appeals that have ruled on the issue. Like the court of appeals here, the Fifth, Seventh, and Eighth Circuits have held that the use of a thermal imaging device to detect heat emanating from a structure does not constitute an unreasonable search. *Ishmael*, 48 F.3d at 853-857; *United States* v. *Myers*, 46 F.3d 668, 669-670 (7th Cir.), cert. denied, 116 S. Ct. 213 (1995); *Pinson*, 24 F.3d at 1058-1059.[2]

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[1] The use of the FLIR device in this case was no more intrusive than the warrantless use of a trained drug detection dog to sniff luggage in a public place that was upheld in *United States* v. *Place*, 462 U.S. 696, 707 (1983). As the court of appeals observed, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." Pet. App. 33 (quoting *Pinson*, 24 F.3d at 1058).

[2] In *United States* v. *Cusumano*, 67 F.3d 1497, 1499-1509 (1995), a panel of the Tenth Circuit ruled that the use of a thermal imaging device to detect heat emitted from a residence violated the Fourth Amendment. On December 5, 1995,

Even if the question presented warranted review by this Court, moreover, the instant case would be an inappropriate vehicle for its resolution. The court of appeals concluded that Agent West's affidavit would have established probable cause to search petitioner's home even in the absence of the information it contained regarding thermal imaging. See Pet. App. 36; page 11, *infra*. A determination that use of the FLIR device was improper therefore would not entitle petitioner to suppression of the evidence seized pursuant to the search warrant. Cf. *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) ("the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred").

2. Petitioner also contends (Pet. 14-19) that Agent West's affidavit in support of the search warrant for his residence did not establish probable cause for issuance of the search warrant. That fact-bound contention does not warrant this Court's review.

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however, the Tenth Circuit vacated the panel's decision in *Cusumano* and granted rehearing en banc in that case.

In *United States* v. *Kyllo*, 37 F.3d 526, 530-531 (1994), the Ninth Circuit found that the record was insufficiently developed to determine whether the use of a thermal imaging device to scan the defendant's residence constituted a search. The Ninth Circuit remanded for an evidentiary hearing on the technological capacities of the thermal imaging device used in that case. See also *United States* v. *Domitrovich*, 852 F. Supp. 1460, 1472-1475 (E.D. Wash. 1994), aff'd on other grounds, 57 F.3d 1078 (9th Cir. 1995) (Table); *United States* v. *Penny-Feeney*, 773 F. Supp. 220, 225-228 (D. Haw. 1991), aff'd on other grounds, 984 F.2d 1053 (9th Cir. 1993).

The court of appeals correctly concluded that "[t]he thermal imagery evidence in addition to the cumulative impact of the other evidence amply demonstrated a fair probability that marijuana cultivation was occurring in [petitioner's] house." Pet. App. 37. Moreover, "[n]otwithstanding the additional evidence obtained from the aerial FLIR surveillance," the court of appeals found that "the weight of the other evidence would have provided sufficient probable cause for issuance of the search warrant in question." *Id.* at 36. In addition to the results of the FLIR surveillance, Agent West's affidavit in support of the search warrant showed that (1) petitioner had ordered and received 30 high-pressure sodium lights from a California company specializing in indoor growing equipment and had paid for the lights with a cashier's check in excess of $7,000; (2) petitioner had purchased other growing equipment from the same company in the past; (3) high-pressure sodium lights can be used to grow marijuana indoors; (4) high-pressure sodium lights consume a large amount of electricity and generate a large amount of heat; (5) the electrical consumption for petitioner's residence increased in the month that he received the high-pressure sodium lights and was higher than for houses of comparable size;[3] and (6) petitioner lived in an attractive house

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[3] The record clearly contradicts petitioner's repeated assertions (Pet. 6, 12, 16-17) that Agent West did not subpoena and obtain the utility records showing the electrical consumption for petitioner's residence until January 31, 1992—the day after the agent applied for and obtained the search warrant on January 30, 1992. At the suppression hearing, Agent West acknowledged that his written report dated February 5, 1992, stated that he had served the subpoena on Dixie Electric Cooperative on January 31, 1992. Agent West testified, how-

with a swimming pool in an affluent area but had not filed state income tax returns. *Id.* at 35-36. The court of appeals therefore correctly concluded that the agent's affidavit in support of the search warrant for petitioner's residence established probable cause with or without the additional information provided by the FLIR surveillance. That fact-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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ever, that that date was not correct and that he believed the correct date was January 3, 1992. 4/7/92 Tr. 14-15. Moreover, since the agent's affidavit in support of the search warrant discusses the utility records and states that they had been obtained by subpoena, it is clear that Agent West obtained the utility records before he applied for the search warrant. 1/30/92 Affidavit 1.